SUPREME COURT OF NOVA SCOTIA
Citation: Innocente v. Canada (Attorney General), 2011 NSSC 184

Date: 20110512
Docket: Hfx.No. 311509
Registry: Halifax

Between:

Daniel Innocente

Plaintiff

v.

Attorney General of Canada

Defendant

DECISION

Judge: The Honourable Justice Kevin Coady

Heard: April 7, 2011, in Halifax, Nova Scotia

Decision: May 12, 2011

Counsel: J. Walter Thompson, QC, for the plaintiff
Sarah Drodge, for the defendant

By the Court:

[1] The Defendant Attorney General of Canada (AGC) moves for an order for summary judgment on the pleadings pursuant to *Civil Procedure Rule* 13.03 (1)(a) and (c) on the grounds that:

> 1) The statement of claim discloses no reasonable cause of action; and
>
> 2) The statement of claim otherwise makes a claim that is clearly unsustainable when the pleading is read on its own.

BACKGROUND:

[2] In 1996 the Plaintiff was charged with seven drug and weapons related offences. In 1997 he was charged with possession of proceeds of crime and possession of a narcotic for the purpose of trafficking. Prior to being charged in 1996, the AGC obtained a search warrant and a restraint order from this court pursuant to section 462.32 and 462.33 of the **Criminal Code of Canada**. These orders prohibited the Plaintiff from disposing of or otherwise dealing in any manner with any interest in his residential property at 47 Granite Cove Drive, Five Island Lake, Nova Scotia.

[3] A number of these charges were stayed on November 17, 2001. However in 1999 Mr. Innocente was tried and convicted of conspiracy to traffic in a cannabis resin and sentenced to seven years imprisonment.

[4] On May 21, 2009, the Plaintiff filed a statement of claim against the AGC alleging that he suffered damages as a result of the "improper withholding of his real and personal property" by the Defendant. In response the AGC brought a motion for summary judgment on the pleadings. The motion was heard by Justice LeBlanc in September 2009.

[5] Justice LeBlanc dismissed the statement of claim in its entirety but without prejudice to the Plaintiff's right to file an amended statement of claim. In reaching his decision he found that the statement of claim "as presently framed does not make out a cause of action." On January 6, 2011, Mr. Innocente filed an amended statement of claim. In response the AGC brought this motion claiming that the renewed motion still does not disclose a reasonable cause of action and provides insufficient details of the claim.

[6] It is not disputed that the AGC undertook, as part of the 1996 warrant and restraint orders, to comply with any court order as to damages and costs sustained by Mr. Innocente as a result of the restraint order. Section 462.32(b) states as follows:

> Before issuing a warrant under this section, a judge shall require the Attorney General to give such undertakings as the judge considers appropriate with respect to the payment of damages or costs, or both, in relation to the issuance and execution of the warrant.

[7] Section 462.33(7) states as follows:

> Before making an order under subsection (3), a judge shall require the Attorney General to give such undertakings as the judge considers appropriate with respect to the payment of damages or costs, or both, in relation to
>
> (a) the making of an order in respect of property situated within or outside Canada; and
>
> (b) the execution of an order in respect of property situated within Canada.

[8] Mr. Innocente submits that after the criminal proceedings were over, the AGC did not seek forfeiture or any remedy pursuant to section 462.32 and 463.32 of the **Criminal Code** or any remedy with respect to the seized property. He submits that in 2004 the AGC applied for and was granted an order revoking the 1996 orders of warrant and restraint. He argues that by that time he lost his house

to foreclosure and his personal property was returned in a "dilapidated stated." Mr. Innocente describes his claim as follows at page 3 of his brief:

> Mr. Innocente, in this action, claims damages and costs in relation to the issuance and the execution of the restraint order on his real property and the warrant for the seizure of his personal property. He says the restraint and the seizure became improper because without a proceeding to forfeiture the restraint and forfeiture lost all purpose and foundation. He says that the restraint obtained by the Attorney General caused the sale of his real property at a substantial loss and after eight years, substantial depreciation of his personal property. The personal property was listed. He says, in summary, that the Attorney General is liable under its undertaking because the Attorney General never proceeded with forfeiture on his conviction for the Henneberry conspiracy and all other charges were either stayed, withdrawn or dismissed.

POSITION OF THE APPLICANT DEFENDANT:

[9] The AGC argues that there is no recognized cause of action because Mr. Innocente does not attack the validity of the 1996 warrant and restraint order. It is the view of the AGC that such a challenge is the only avenue available to Mr. Innocente. The AGC points out that these orders do not terminate upon conviction and relies on sections 462.33(10) and 462.35 of the **Criminal Code** to support this position. A reading of these sections establish that a restraint order may survive conviction.

[10] The AGC points out that Justice LeBlanc, on the previous summary judgment application, found as follows at paragraph 32:

> An undertaking to respond in damages and costs results from the making and the execution of a special warrant and detention order. It does not appear that the undertaking gives rise to a claim other than by way of attack on the making or execution of the special warrant or restraint order.

[11] The AGC argues that the amended statement of claim does not change this fact and, as such, should be struck.

[12] Additionally the AGC argues that the statement of claim does not disclose sufficient material facts to enable the AGC to discern the basis of the Plaintiff's claim for damages. They submit that Mr. Innocente does not plead how the AGC caused him to sell his property at a substantial loss or how the restraint order affected that event. The AGC also submits that Mr. Innocente does not plead what the "dilapidated state" of his personal property means or what property he is referencing.

[13] Additionally the AGC argues that Mr. Innocente's characterization of this action as a "novel claim" does not necessitate a trial. They submit that the law is

settled that a claim does not automatically survive a motion to strike simply because the claim is novel or unprecedented. The AGC relies on the following cite from *Syl Apps Secure Treatment Centre v. B.D.*, [2007] 3 S.C.R. 83 at paragraph 19:

> Both the majority and dissenting reasons acknowledged that imposing such a duty of care would represent a novel duty at law. The benefit of making a determination on a Rule 21 motion about whether such a duty should be recognized, is obvious. If there is no legally recognized duty of care to the family owed by the defendants, there is no legal justification for a protracted and expensive trial. If, on the other hand, such a duty is accepted, a trial is necessary to determine whether, on the facts of this case, that duty has been breached.

[14] It is the position of the AGC that terming this action "novel" does not allow the plaintiff to avoid the rules concerning pleadings.

POSITION OF THE RESPONDENT PLAINTIFF:

[15] Mr. Innocente acknowledges that the charges laid against him may sustain a seizure and restraint order under the **Criminal Code**. He further acknowledges, for the purpose of this action, that the 1999 seizure and warrant were properly obtained and does not challenge the process by which they were authorized.

[16] Mr. Innocente argues that Justice LeBlanc was wrong when he stated "it does not appear that the undertaking gives rise to a claim other than by way of attack on the making or execution of the special warrant or restraint order." It is of some note that Mr. Innocente has not appealed Justice LeBlanc's ruling on the first summary judgment application, given his position on this application. It is also of note that Mr. Innocente was convicted of conspiracy to traffic and sentenced to seven years imprisonment. He hangs this claim on the fact that the crown did not push the matter all the way to forfeiture and, instead, returned it to him in 2004.

[17] Mr. Innocente has not provided authority for his position that recovery pursuant to these undertakings does not require an attack on the validity of the enabling orders. He does not provide authority for his position that a failure to proceed to forfeiture triggers these undertakings. The AGC has not provided clear authority that Mr. Innocente's positions are wrong in law. The fact that the crown can extend these orders does not settle the above stated issues. While the undertakings are founded in the **Criminal Code**, they amount to a contract between the crown and the offender. Section 462.32(4) of the code imposes a duty on the crown to take "reasonable care to ensure that the property is preserved."

This is an indication of the will of parliament to provide the citizen with some protection when the state seizes property before conviction.

[18] I have not been provided with the details of these undertakings. I have no evidence as to whether they are standardized or vary from case to case. Nonetheless, it seems clear to me that the undertaking creates a cause of action. This does not suggest that Mr. Innocente's cause of action has any merit, only that it exists.

[19] Mr. Innocente further argues that he has provided sufficient details in his statement of claim to enable the AGC to discern the basis of his claim for damages. He submits that greater detail will emerge as the action proceeds through discovery examination. He states that there is nothing novel about his action given it is rooted in legislation.

THE CAUSE OF ACTION:

[20] I have concluded that Mr. Innocente has a cause of action arising from the statutory undertakings given by the AGC in 1996. While this is a significant

factor, it does not necessarily defend against this summary judgment application based on the pleadings.

PARTICULARS OF DAMAGES:

[21] The AGC argues that notwithstanding finding a cause of action, the plaintiff's amended statement of claim does not plead sufficient material facts to comply with the rules. The following rules address the sufficiency of a claim:

> 4.02(4) The statement of claim must notify the defendant of all the claims to be raised by the plaintiff at trial, conform with Rule 38 - Pleading, and include each of the following:
>
> (a) a description of the parties;
>
> (b) a concise statement of the material facts relied on by the plaintiff, but not argument or the evidence by which the material facts are to be proved;
>
> (c) reference to legislation relied on by the plaintiff, if the material facts that make the legislation applicable have been stated;
>
> (d) a concise statement of the remedies claimed, except costs.
>
> 38.02 General principles of pleading

(1) A party must, by the pleading the party files, provide notice to the other party of all claims, defences, or grounds to be raised by the party signing the pleading.

(2) The pleading must be concise, but it must provide information sufficient to accomplish both of the following:

(a) the other party will know the case the party has to meet when preparing for, and participating in, the trial or hearing;

(b) the other party will not be surprised when the party signing the pleading seeks to prove a material fact.

(3) Material facts must be pleaded, but the evidence to prove a material fact must not be pleaded.

38.03 Pleading a claim or defence in an action

(1) A claim or defence in an action, and a claim or defence in a counterclaim, crossclaim, or third party claim, must be made by a statement of claim that conforms with Rules 4.02(4) and 4.03(5), of Rule 4 - Action, or a statement of defence that conforms with Rule 4.05(4) of Rule 4.

(2) The following additional rules of pleading apply to all pleadings in an action:

(a) a description of a person in pleadings must not contain more personal information than is necessary to identify the person and show the person’s relationship to a claim or defence;

(b) claims or defences may be pleaded in the alternative, but the facts supporting an alternative claim or defence must be pleaded distinctly;

> (c) a pleading that refers to a material document, such as a contract, written communication, or deed must identify the document and concisely describe its effect without quoting the text, unless the exact words of the text are themselves material;
>
> (d) a pleading that alleges notice is given must state when the notice was given, identify the person notified, and concisely describe its content without quoting the text, unless the exact words of the text are themselves material.
>
> (3) A pleading must provide full particulars of a claim alleging unconscionable conduct, such as fraud, fraudulent misrepresentation, misappropriation, or malice.

[22] The AGC submits that the amended statement of claim gives no indication as to how they allegedly caused damages in respect to his real and personal property.

[23] I am unaware that Justice LeBlanc found that the original statement of claim was deficient in this respect. He described the AGC position at paragraph 13:

> [13] Among the alleged deficiencies identified by the Attorney General in the pleading are the absence of "material facts to explain what relevance the restraint order had on [Mr. Innocente's] decision to sell his house or on the value of his house when he sold it in June 2002;" the lack of specifics on "what personal property was allegedly seized, or when it was returned," or, for that matter, "what exactly, if anything, he claims happened to his personal property" during the period it was seized, or whether the claim "is based solely on the alleged deterioration and loss of value" of the personal property.

[24] Justice LeBlanc went on to say at paragraph 34 that "given this lack of clarity, the plaintiff's assertion that he is entitled to damages ... is dubious."

[25] I now must look at the amended statement of claim to determine whether it offers any more detail than the original. I have reviewed the amendments in paragraph 4 through 12. I find these paragraphs to be nothing more than a history of the 1996-2004 legal proceedings. These paragraphs add nothing about the alleged real estate loss or the dilapidation of personal property. There is nothing stated that would answer any of the questions asked in paragraph 13 previously referenced.

[26] The next amendment is paragraph 16 which states:

> 16. Mr. Innocente says that in 1995, the Defendant conducted an analysis of his net worth and concluded that his net worth was $750,000.00. He says that by the time the order restraining and seizing his property of June 24, 1996 was revoked, his net worth had been diminished to nothing.

[27] This amounts to nothing more than a bald statement without any supporting details. I conclude that the amendments add nothing to the statement of claim that was before Justice LeBlanc.

[28] *Civil Procedure Rule* 13:03 sets out the principles governing summary judgment on the pleadings:

> (1) A judge must set aside a statement of claim, or a statement of defence, that is deficient in any of the following ways:
>
> > (a) it discloses no cause of action or basis for a defence or contest;
> >
> > (b) it makes a claim based on a cause of action in the exclusive jurisdiction of another court;
> >
> > (c) it otherwise makes a claim, or sets up a defence or ground of contest, that is clearly unsustainable when the pleading is read on its own.
>
> (2) The judge must grant summary judgment of one of the following kinds, when a pleading is set aside in the following circumstances:
> ....
>
> > (b) dismissal of the proceeding, when the statement of claim is set aside wholly;
> >
> > ....
> >
> > (d) dismissal of a claim, when all parts of the statement of claim that pertain to the claim are set aside.
>
> (3) A motion for summary judgment on the pleadings must be determined only on the pleadings, and no affidavit may be filed in support of or opposition to the motion....

[29] Hamilton J.A. described the test under the former *Rule* 14.25 (1972) which was replaced by *Rule* 13.03. In *MacQueen v. Ispat Sidbec Inc.*, 2007 NSCA 33 she stated at paragraph 8:

> All parties agree that a pleading should only be struck if it is "plain and obvious" that the claim does not disclose a cause of action; that the action is "obviously unsustainable." This test was recently approved by this Court in *Mabey v. Mabey* (2005), 230 N.S.R. (2d) 272 (N.S. C.A.):
>
> > [13] It is well settled that the test pursuant to Rule 14.25(1)(a) is that the application will not be granted unless the action is "obviously unsustainable." In considering an application to strike out a pleading it is not the court's function to try the issues but rather to decide if there are issues to be tried. The power to strike out pleadings is to be used sparingly and where the action raises substantial issues it should not be struck out: *Vladi Private Islands Ltd. v. Haase et al.* (1990), 96 N.S.R. (2d) 323, 253 A.P.R. 323 (C.A.). An application for variation should not be struck out unless it is certain to fail, or it is plain and obvious that it will not succeed. Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the respondent to present a strong defence should prevent the applicant from proceeding with his or her case: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, 117 N.R. 321.

[30] *Civil Procedure Rule* 13:03(1) states that a statement of claim must be set aside for "any" of the three enumerated grounds. I rely on the third ground to conclude that this action must be set aside because it is "clearly unsustainable when the pleading is read on its own."

[31] I find that Mr. Innocente's claim is clearly unsustainable. Accordingly his amended statement of claim is dismissed with costs to the AGC in the amount of $500.00.

J.